

144231 Wolcott



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Loral Fairchild Corp.  
**File:** B-242957  
**Date:** June 24, 1991

Ronald K. Henry, Esq., Baker & Botts, for the protester.  
Charles H. Bayar, Esq., Whitman & Ransom, for Elmo Corporation and Telemetrics, Inc., and Rick Clifford for Pacific Video Product, Inc., interested parties.  
Gregory H. Petkoff, Esq., and W. Wayne Ross, Esq., Department of the Air Force, for the agency.  
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest challenging solicitation specifications is timely where filed prior to closing date for receipt of proposals, although filed more than 10 days after the agency responded to the protester's agency-level protest by making several modifications to the solicitation requirements.
2. The General Accounting Office will not review a protest assertion that a solicitation should include additional, more restrictive solicitation requirements incorporating internal agency standards.
3. Design specifications "written around" the features of a particular item are not improper where the specifications are reasonably related to the agency's minimum needs.
4. Where a protester did not submit a proposal, and its protest alleging overly restrictive specifications is denied, the protester is not an interested party to further challenge the procurement with respect to matters which affect only the actual offerors.

### DECISION

Loral Fairchild Corp. protests certain requirements under request for proposal (RFP) No. F09603-90-R-81286, issued by the Air Force to acquire an improved video recording system for 750 U.S. Air Force F-15 aircraft and 122 foreign military

sales F-15 aircraft.<sup>1/</sup> In particular, in its protest filed in our Office on February 14, 1991, Loral asserts that the specifications failed to meet the agency's minimum needs; the specifications were overly restrictive; the evaluation criteria were ambiguous; and the camera the Air Force allegedly intends to acquire is manufactured by Toshiba Corporation, contrary to the Multilateral Export Control Enhancement Amendments Act, 50 U.S.C.A. § 2410a (West Supp. 1990).<sup>2/</sup> We deny the protest in part and dismiss it in part.

#### BACKGROUND

The RFP, issued on August 15, 1990, contained a list of design specifications which the Air Force states were based on a video system developed by the Air National Guard in 1988. Under the RFP, the contractor is required to provide a complete video system including camera, video recorder, playback unit, and spare parts.

On September 14, 1990, Loral filed an agency-level protest raising issues substantially similar to those presented here. The Air Force responded to Loral's agency-level protest by amending the RFP in several ways. On January 22, 1991, the Air Force issued a decision stating that portions of Loral's agency-level protest were sustained and referencing the RFP modifications as the proper corrective action. Closing date for receipt of proposals was February 15, 1991. Three proposals were submitted; Loral did not submit a proposal.

#### TIMELINESS

The Air Force argues that Loral's protest is untimely under section 21.2(a)(3) of our Bid Protest Regulations, which provides that in instances where a protest challenging a solicitation's specifications has been filed initially with a contracting agency, a subsequent protest to our Office must be filed within 10 days of the "initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1991). The Air Force argues that its January 22, 1991, decision constituted adverse action and,

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<sup>1/</sup> Loral is currently providing a black and white video system which is used in the F-15 aircraft.

<sup>2/</sup> Following the bid protest conference held on this case, Loral filed a supplemental protest asserting that the RFP failed to provide for evaluation of all costs and challenging the Air Force's issuance of an amendment to the RFP. Since the record on the supplemental protest was not complete at the time this decision was drafted, we will address these issues in a subsequent decision.

since Loral's protest to our Office was not filed within 10 days of that decision, the protest should be dismissed. We disagree.

As discussed above, the Air Force responded to Loral's agency-level protest by modifying the RFP in several ways. Because the Air Force responded in a positive manner, altering the RFP provisions Loral now challenges, we do not view the January 22 decision as constituting "adverse agency action." Therefore, we decline to dismiss the protest as untimely.

#### ALLEGED FAILURE OF THE RFP TO SET FORTH THE AGENCY'S NEEDS

Loral challenges the RFP specification on the basis that they fail to satisfy the Air Force's minimum needs with regard to environmental and safety matters. Loral references various military standards and Air Force regulations as a basis for objecting that the RFP fails to require the video system components to be tested for "electro-magnetic interference, vibration, explosive atmosphere, or explosive decompression."

Loral's complaint that additional environmental and safety requirements should be included in the RFP is based on internal Air Force regulations which do not provide legal rights for outside parties. See generally Maremont Corp., 55 Comp. Gen. 1362, 1382 (1976), 76-2 CPD ¶ 181; Sabreliner Corp., B-242023; B-242023.2, Mar. 25, 1991, 91-1 CPD ¶ 326; Pacific Architects and Eng'rs, Inc., B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494. Further, under the Competition in Contracting Act of 1984, we only consider protests filed by interested parties. 31 U.S.C. § 3553(a) (1988). An interested party is defined by the act as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2). Loral has not suggested that the absence of the environmental and safety requirements precluded it from submitting a proposal; nor has it otherwise explained how it is economically affected by the absence of these requirements. Consequently, it is not clear that Loral is an interested party to challenge this aspect of the RFP. Marine Instrument Co., B-242166, Mar. 29, 1991, 91-1 CPD ¶ 336; Mid-Atlantic Serv. & Supply Corp., B-218416, July 25, 1985, 85-2 CPD ¶ 86. Loral's protest that the RFP was defective for failing to include additional requirements is dismissed.

#### OVERLY RESTRICTIVE SPECIFICATIONS

Conversely, Loral protests that the RFP contains overly restrictive requirements, arguing that the Air Force's use of design specifications rather than functional specifications was improper. Loral specifically refers to the RFP's

requirements that the camera head weigh no more than 25 grams and be no longer than 59.4 millimeters, and contends that these limitations on size and weight of the camera head effectively require offerors to propose "two-piece" cameras and exclude Loral's "one-piece" camera.<sup>3/</sup> Loral has suggested that the Air Force should permit a camera head weight of 2 pounds, or approximately 900 grams.

The determination of the government's minimum needs and the best methods for accommodating those needs are generally the responsibility of the contracting agency which is most familiar with the conditions under which the products will be used. Maremont Corp., 55 Comp. Gen. 1362, supra. Although section 10.002 of the Federal Acquisition Regulation states that agencies should use functional specifications when practicable, design specifications based upon a particular product are not improper in and of themselves. AGEMA Infrared Sys., B-232195, Nov. 21, 1988, 88-2 CPD ¶ 498. We will not object to specifications that are "written around" design features of a particular item where the agency explains why the design specified is necessary to meet its minimum needs. Gel Sys., Inc., B-234283, May 8, 1989, 89-1 CPD ¶ 433; Fleetwood Elecs., Inc., B-216947.2, June 11, 1985, 85-1 CPD ¶ 664. Where a protester challenges a specification as unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specifications are reasonably necessary to meet its minimum needs. Embraer Aircraft Corp., B-240602, 240602.2, Nov. 28, 1990, 90-2 CPD ¶ 438.

The Air Force states that the camera head must be mounted in a fixed position in front of the pilot on the cockpit console in order to automatically record images of the Heads-Up Display. The Air Force explains that the limitation on the length of the camera head is necessary to prevent excessive protrusion into the pilot's view of the Heads-Up-Display. Additionally, the Air Force states that, during flight, the pilot needs to be able to easily remove the camera and point it at various cockpit indicators to record unusual occurrences or point it outside the cockpit to record external intelligence information such as the level of damage to targets. The Air Force states that the small size and light weight required by

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3/ As described by Loral, microcameras are either "one-piece" or "two-piece." Two-piece cameras are those in which the camera head is physically separate from (but connected by cable to) the camera control electronics unit. One-piece cameras are those in which the camera head and the camera control electronics are physically integrated into a single unit. The camera Loral is currently providing to the Air Force is a one-piece camera.

the RFP permit the pilot to remove, use, and replace the camera with a single hand, and that increasing the permissible weight and size requirements to accommodate larger, heavier, one-piece cameras would limit or preclude this function. Additionally, the Air Force states that the camera will be subjected to a considerable amount of vibration and centrifugal force caused by the aircraft's rapid acceleration.<sup>4/</sup> In order to accommodate the need to remove and replace the camera head during flight, the Air Force must use a more flexible mount than the one currently in use and it notes that a heavier camera head would significantly increase the risk that the camera would break loose from that mount.

Loral first complains that the need for hand-held operation of the camera was not identified in the RFP. However, this complaint lacks merit since the RFP used design specifications rather than functional specifications. As discussed above, design specifications are permissible where the agency explains why such specifications are necessitated by its needs.

Loral next argues that a larger, one-piece camera could adequately meet the Air Force's needs, maintaining that the RFP's limitations are driven only by the type of camera mount the Air Force intends to use. Loral's argument ignores the fact that obstruction of a pilot's view depends on the size of the camera, not the type of mount used. Regarding hand-held operation, Loral argues that its one-piece camera "could easily be accommodated on a [different] detachable mount." However, it fails to explain why a significantly larger, heavier camera would not reduce the effectiveness of in-flight, hand-held camera operation. Accordingly, Loral has failed to demonstrate that the Air Force's rationale is unreasonable, and we have no basis to conclude that the RFP is overly restrictive.

#### LORAL'S STANDING TO RAISE OTHER PROTEST ISSUES

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1991), a protest may be filed only by an "interested party," defined as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Determining whether a party is sufficiently interested involves consideration of a party's status vis-a-vis the procurement and the


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<sup>4/</sup> The record indicates that F-15 aircraft are subject to gravitational forces up to nine times the normal gravitational pull, i.e., up to nine "G's."

nature of the issues protested. Free State Reporting, Inc. et al., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54.

Loral chose not to submit a proposal responding to the RFP, stating that the camera head weight and dimensional specifications are "absolutely critical" and that, standing alone, these specifications preclude proposals of single unit cameras. Loral was an interested party to challenge the restrictiveness of the camera specifications since, if we had sustained that portion of its protest, the remedy would have been a resolicitation under which Loral could have competed. DJ's Servs., Inc., B-240623, Dec. 5, 1990, 90-2 CPD ¶ 459. However, based on our conclusion above that the terms of the solicitation are not overly restrictive, since Loral elected not to submit a proposal, Loral has no further direct economic interest in the procurement and, therefore, is not an interested party to otherwise challenge the procurement. Maytal Constr. Corp., B-241501; B-241501.2, Dec. 10, 1990, 90-2 CPD ¶ 476. Accordingly, Loral's contentions regarding the evaluation criteria and the possibility that the Air Force will acquire a product allegedly manufactured by Toshiba Corporation are dismissed.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel